CHONG TENG v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Hill and Good JJ.A.) February 12, 1960]

[K. L. — F.M. Criminal Appeal No. 43 of 1959]

Criminal Law and Procedure — Confession — Voluntarily made to Magistrate through interpreter — Whether confession made in the "presence" of Magistrate — Criminal Procedure Code (Cap. 6), s.115.

Evidence — Confession made through interpreter — Dialect not understood by Magistrate — Admissibility — Evidence Ordinance, 1950, s.26.

Criminal Procedure — Interpreter — Independent.

Criminal Law — Murder — Provocation — Penal Code, s.300, first Exception proviso 1.

The appellant had been convicted on a charge of murder. The last ground of appeal concerned the statement which he had made voluntarily to a Magistrate the day after his arrest. The Magistrate, however, although a Chinese, did not understand the Chinese dialect spoken by the appellant and so had to make use of an interpreter. Both the Magistrate and the interpreter gave evidence at the trial and from their evidence it was clear that after some preliminary discussion the appellant made a statement in his own language which was interpreted into English to the Magistrate who wrote it down in English. What was written in English was then read back to the appellant in his own language by the interpreter and the appellant adhered to it and affixed his thumb print to the statement as written down by the Magistrate which was then signed both by the interpreter and the Magistrate. This written statement was produced at the trial by the Magistrate and also sworn to by the interpreter and was read to the jury.

It was urged for the appellant that what was recorded was not a confession made to a Magistrate but a confession made to the interpreter and therefore section 115 of the Criminal Procedure Code had no application. It was also contended for the appellant that the confession could not be said to be made in the "presence" of the Magistrate because section 26 of the Evidence Ordinance must be construed as requiring not only mere physical presence on the part of the Magistrate but presence in the sense of being able to hear and understand everything said by the prisoner. It was submitted that the English translation of what the appellant said was not admissible because it was hearsay. It was the Magistrate's record not of what the appellant said to him but of what the interpreter said the appellant had said.

Held: (1) the statement in question amounted to a confession and by reason of section 26 of the Evidence Ordinance a confession made by a person while in custody is only admissible if it is made in the immediate presence of a Sessions Court President or a Magistrate;

(2) in the present case the provisions of section 115 of the Criminal Procedure Code were complied with and therefore the confession was properly admitted. *Cheong See Leong* v. *Public Prosecutor* (3) followed;

(3) to bring a case within the first proviso and so take it out of the Exception 1 to section 300 of the Penal Code it is not sufficient that the accused must go to the provocation, he must go to it as an excuse for killing. In this case the appellant on his own admission had gone to the place with the intention of fighting the deceased. Therefore it did not lie in his mouth to say that any violence to him (if it was offered) by the deceased could be described as sudden, that is unexpected;

Per curiam: "Confining the argument (of principle) for the moment to section 115 of the Criminal Procedure Code and section 26 of the Evidence Ordinance, what is the object of saying the confession must be made to a Magistrate? What is the object of saying that the confession must be made in the presence of a Magistrate? In both cases it is to ensure that confessions are not improperly obtained and to ensure that if they are made at all they are made in conditions that guarantee their voluntary nature. It seems to us that in view of the constant practice of the Courts in working through interpreters and the very great experience that Magistrates have in this type of working, this object is as effectively attained where the Magistrate joins with himself an independent interpreter as when the Magistrate is able to function alone without any such assistance."

Cases referred to:—

(1) *Nazir Ahmad* v. *King-Emperor*, 63 I.A. 372; A.I.R. 1936 P.C. 253 (2).

(2) *R.* v. *Attard*, 43 Cr. App. R. 90.

(3) *Cheong See Leong* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 56.

COURT OF APPEAL. Criminal Appeal from the decision of Ismail Khan J. in Seremban Criminal Trial No. 8 of 1959.

M. Shanker for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering the judgment of the Court): This appellant was tried at Seremban before Ismail Khan J., and a jury on a charge that on 16th August, 1959, at the Central Market in Seremban he murdered one Fan Nam in contravention of section 302 of the Penal Code. He was convicted and sentenced to death. He appealed against his conviction and we dismissed his appeal on 12th January, 1960. We now state our reasons for doing so.

Up to a point, the facts of the case were not in dispute and, in particular, it was never in serious dispute that the deceased died as a result of one of two stab wounds inflicted on him with a knife by the appellant.

The prosecution case was that some two years before the killing the appellant's wife left him, taking with her seven of their nine children, and went to work on an estate between Seremban and Port Dickson where the deceased was a contractor. The appellant made repeated attempts to get her to return to him which were unsuccessful and formed the opinion that the deceased had enticed her away from him and was in some way harbouring her.

On 16th August, 1959, the deceased was having tea with three friends in the Seremban Market when the appellant came up to him and stabbed him. Two wounds were inflicted, one of which penetrated the heart. The stabbing was followed by a struggle and in the event the appellant walked away leaving the deceased on the ground not dead but bleeding profusely, and while walking away was arrested by a Police Officer who had been attracted by the noise. The deceased was taken to hospital but was too far gone for anything useful to be done for him there and he died shortly after his arrival.

There were actually four eye-witnesses of the stabbing because in addition to the deceased's three friends it was seen by a man sitting at a neighbouring table and although all four witnesses were, as is so often the case in this country, reluctant to say a great deal as to what they actually saw, they all agreed that prior to

the stabbing no words passed between the parties and there was no struggle.

The following day the appellant made a statement to a Magistrate, the voluntary nature of which has at no time been questioned either at the trial or before us. In this statement he told a story which was up to a point substantially the story he told at his trial. He said that originally his wife was enticed away from him by the deceased and that his efforts to get her back had been met with insults and assaults. Two weeks before the Chinese New Year, that would be about the end of January, 1959, the deceased told him that he could either take legal proceedings to get his wife back or have a fight. Nothing more seems to have happened until 15th August, that is to say for over six months, when he met the deceased in Seremban. The deceased then abused him and challenged him to fight and arranged for them to meet the following day "to settle the issue". He went to the Market the following day at the arranged time and found the deceased waiting for him. The deceased asked him if he wanted to drink drain water and he replied that he did and the deceased then attacked him with a chair. The onlookers tried to separate them and he (the appellant) fell to the ground. The deceased came and tried to strike him with his fist and on that he drew a knife from his pocket "and thrust at him."

At the trial the appellant gave evidence on oath. He repeated the story of his domestic misfortunes as he had told it to the Magistrate but in somewhat greater detail, including the fact that at some stage of the proceedings his 18 year old daughter had had an abortion. He repeated the story of the deceased challenging him to a fight and of his going to the Market place the following day to accept that challenge but he gave a slightly different version of what happened at the fight. He said the deceased commenced the fight by striking him with a chair. The deceased's friends came to the assistance of the deceased and assaulted him (the appellant). He fell to the ground. He then got up, took a knife from his pocket and waved it about while the deceased's friends tried to take it from him and he had no knowledge if the knife touched any of them. In cross-examination he admitted that he went to the Market place prepared to fight and that it was on the very day of the fight that he bought the knife which he used but he said that he bought it to protect himself because the deceased had said "we could use our fists or knife in the fight".

The learned trial Judge dealt with the case in a long and careful summing-up. He pointed out that it was for the jury to say whether they accepted the story of the prosecution witnesses or the story of the appellant as to what happened in the Market place on 16th August. They were entitled to presume that if the appellant stabbed the deceased in the heart with a knife like the one produced in Court he did so with the intention of causing death. If they were satisfied that the appellant stabbed the deceased with the intention of killing him and there was nothing more to it then the appellant was guilty of murder. The Judge refused, and I will deal with this shortly, to leave any defence of provocation to the jury but he dealt with what he regarded as the available defences of sudden quarrel and private defence and pointed out the circumstances in which the jury should take these defences into account and find the appellant guilty not of murder but of culpable homicide not amounting to murder. If the jury thought that the killing was accidental, that is to say the appellant was just waving his knife about and it happened to get into the deceased then of course he was not guilty of any offence, unless he was waving it rashly or negligently when he would be guilty of causing death by a rash or negligent act. Again, if he stabbed the deceased but had no intention of killing him then what he did would amount to causing grievous hurt.

In the event the jury by a majority of five to two found the appellant guilty of murder and the trial Judge accepted that verdict.

Before us the conviction was attacked on four main grounds.

In the first place it was said that the learned trial Judge failed to direct the jury adequately on the law of murder in that he merely read out to them sections 299 and 300 of the Penal Code without explaining these sections or the distinction between when a killing is and is not murder.

A perusal of the summing-up as a whole does not support this complaint. It is true that the Judge in the initial stages of his summing-up read the relevant sections of the Penal Code to the jury and then proceeded to discuss the evidence. Had the matter rested there we might have been prepared to say that his direction on the law was unsatisfactory. To read to a jury sections 299 and 300 of the Penal Code without comment or explanation is calculated to darken rather than to enlighten their minds. But the matter did not rest there. When he had discussed the evidence the Judge returned to the law and explained it to the jury in simple language in a way which in our opinion was entirely adequate and, except on one very minor point to which I am coming, completely accurate.

Then it was said that the trial Judge was wrong in telling the jury, as he did tell them, that as a matter of law the defence of provocation was not open to the appellant.

The Judge explained that by reason of the first exception to section 300 of the Penal Code what would otherwise be murder is not murder if the offender kills while deprived of the power of self-control by grave and sudden provocation. He went on to say that even if the jury thought that the deceased had taken away the appellant's wife and interfered with his daughter that could not be provocation within the meaning of the exception because it happened a long time ago and so was not sudden. As regards what happened in the Market place on 16th August, he said that this could not be provocation by

reason of the first proviso to exception 1 to section 300 and went on to say: "The law says the provocation must come to you. You should not go to the provocation".

In our view this statement of the law is not altogether accurate. Exception 1 to section 300 provides that culpable homicide is not murder if the offender kills while deprived of the power of self-control by grave and sudden provocation. But this is subject to two provisoes the first of which is that the provocation must not be sought "as an excuse for killing" any person. In other words to bring a case within the proviso and so take it out of the exception it is not sufficient that the accused must go to the provocation, he must go to it as an excuse for killing.

Nevertheless, in spite of this defect in his reasoning the trial Judge's conclusion that in law a defence of provocation was not open to the appellant was in our judgment correct. As he pointed out, whatever happened in the way of taking away the appellant's wife happened a long time ago. As regards what happened in the Market place on 16th August, even if it was thought that the appellant had then received some sort of provocation that provocation could not by any stretch of the English language be described as sudden. "Sudden" means unexpected and in view of the fact that the appellant on his own admission had gone to the Market place with the intention of fighting with the deceased it did not lie in his mouth to say that any violence offered to him (if it was offered) by the deceased could be described as unexpected.

In any event provocation was not the appellant's defence at the trial. He said nothing about provocation. He said nothing about losing his self-control. His only real defence was that he was acting in defence of his own person when he stabbed the deceased and that defence was put to the jury by the Judge with very great care.

The third main ground of appeal arose out of a piece of evidence that was given by the appellant's wife and which did not seem to attract very much attention at the trial. She was called as a prosecution witness and gave evidence of how she came to leave the appellant and went to live and work on the deceased's estate. She told a story which might or might not be true of ill-treatment by the appellant which had forced her to leave him, and in the course of that story she said that he had threatened her with a knife and threatened to kill her.

No objection was made at the trial but before us it was said that this particular piece of evidence should not have been admitted because it was evident that the appellant was a very bad character and had a propensity to use a knife and that as such it was irrelevant and extremely prejudicial.

In the absence of a complete transcript it is not quite clear how this particular piece of evidence came into the case. It is not clear whether it was elicited by counsel for the prosecution or whether it was volunteered by the witness. Strictly speaking, perhaps, it should not have been admitted. It may be that if it slipped in as it were by accident the Judge should have made some reference to it in his summing-up and urged the jury to disregard it although this might well have done the appellant more harm than good by reminding the jury of a very small piece of evidence which they might well have forgotten. But even if the point were to be decided in favour of the appellant it is a case where in our view the proviso to section 29 of the Courts Ordinance should be applied because we fail to see how in the light of the evidence as a whole this particular piece of evidence could possibly have influenced any reasonable jury one way or another.

The last ground of appeal and the one which has caused us most concern is connected with the statement which the appellant made to a Magistrate the day after his arrest.

As has been said, the voluntary nature of that statement has not at any time been attacked. The Magistrate, however, although a Chinese did not understand the Chinese dialect spoken by the appellant and so had to make use of an interpreter. Both the Magistrate and the interpreter gave evidence at the trial and from their evidence it is clear that after some preliminary discussion the appellant made a statement in his own language which was interpreted into English to the Magistrate who wrote it down in English. What was written in English was then read back to the appellant in his own language by the interpreter and the appellant adhered to it and affixed his thumb print to the statement as written down by the Magistrate which was then signed both by the interpreter and the Magistrate. This written statement was produced at the trial by the Magistrate and also sworn to by the interpreter and was read to the jury.

This statement amounted to a confession and by reason of section 26 of the Evidence Ordinance a confession made by a person while in custody is only admissible if it is made in the immediate presence of a Sessions Court President or a Magistrate. The taking of such confessions is governed by section 115 of the Criminal Procedure Code which provides that any Magistrate "may record any statement or confession made to him" and then goes on to lay down the manner in which such a statement or confession is to be recorded. In the case of *Nazir Ahmad* v. *King-Emperor*[1] it was held by the Privy Council in relation to section 164 of the Indian Code, which corresponds to our section 115, that quite apart from the provisions of section 26 of the Evidence Ordinance a statement in order to be admissible must be recorded strictly in accordance with the provisions of the Criminal Procedure Code.

In the present case the provisions of section 115 were clearly complied with but for the appellant it was urged upon us that what was recorded was not a confession made to a Magistrate but a confession made to the interpreter and there-

fore the section had no application. Moreover, it was argued that the confession could not be said to be made in the "presence" of the Magistrate because section 26 of the Evidence Ordinance must be construed as requiring not only mere physical presence on the part of the Magistrate but presence in the sense of being able to hear and understand everything said by the prisoner. Again it was said that the English translation of what the appellant said was not admissible because it was hearsay evidence. It was the Magistrate's record not of what the appellant said to him but of what the interpreter said the appellant had said.

In support of this argument our attention was invited to the ruling of Gorman J., in the case of *R.* v. *Attard*[2]. In that case the accused who was a Maltese was alleged to have made a statement to a Police Officer through an interpreter and the prosecution tendered the Police Officer's evidence as to that statement but did not propose to call the interpreter as a witness. Gorman J., held that in all the circumstances of the case "the evidence ought not to be given through the mouth of the Detective Superintendent".

Although we were impressed with the way in which the point was urged upon us by Mr. Shankar, in our opinion it is without real substance.

As regards *Attard's case* there is all the difference in the world between that case and the present one because in the present case the interpreter was called as a witness as well as the Magistrate.

What is more in point is the judgment of this Court in the case of *Cheong See Leong* v. *Public Prosecutor*[3]. That was a case where the Court was concerned with a statement made through an interpreter to a Police Officer under the Emergency Regulations. In the course of the judgment it was said by Spenser Wilkinson J.:—

> "The only practicable way in which one person can make a statement to another in a language that the latter does not understand is either by signs or through interpretation. In the ordinary way an independent interpreter ..... may be taken as being a mere 'conduit-pipe' incapable of invention to the detriment of the accused. A statement thus made through a mere 'conduit-pipe' by an accused to a Police Inspector is, in our view a statement properly made by him to the Inspector."

In the event the statement in question in that case was held to have been wrongly admitted on the ground that the interpreter who was used was likely to have been biased and the passage which has been quoted must therefore be treated as *obiter* and not necessarily binding on us. Nevertheless it states a view which we consider to be correct and which has been implicitly accepted in this country ever since the commencement of the administration of justice on modern lines. It is indeed no exaggeration to say that if such a view were not accepted and acted upon by the Courts the administration of justice would in many cases be literally impossible. In the present case, for example, the appellant speaks the "Hoi Luk Fung" dialect which no Magistrate in the country understands. If a suitable interpreter is not to be regarded in effect as part of the Magistrate then so far as concerns people speaking that dialect and indeed many other Chinese and Indian dialects section 115 of the Criminal Procedure Code (and a number of other provisions of our law) might as well be erased from the statute book. Every Judge and every Magistrate spends at least half his working time listening to interpreters translating into English or Malay evidence which as it comes from the lips of witnesses he cannot understand. In one way or another the sanction of an oath or affirmation is always present to ensure honesty of translation. But translation there must be and the provisions of the Code of Criminal Procedure must be interpreted in the light of that necessity.

To our mind this argument of necessity is overwhelmingly strong. It can, however, be reinforced by an argument of principle. Confining the argument for the moment to section 115 of the Criminal Procedure Code and section 26 of the Evidence Ordinance, what is the object of saying the confession must be made to a Magistrate? What is the object of saying that the confession must be made in the presence of a Magistrate? In both cases it is to ensure that confessions are not improperly obtained and to ensure that if they are made at all they are made in conditions that guarantee their voluntary nature. It seems to us that in view of the constant practice of the Courts in working through interpreters and the very great experience that Magistrates have in this type of working this object is as effectively attained where the Magistrate joins with himself an independent interpreter as when the Magistrate is able to function alone without any such assistance.

In all the circumstances we are of the opinion that in the present case the confession was properly admitted.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

PUBLIC PROSECUTOR v. ONG KEE SEONG

[A. Cr. J. (Ismail Khan J.) February 15, 1960]

[Seremban — Criminal Appeal No. 16 of 1959]

Criminal Law and Procedure — Appeal against acquittal on two charges — Withdrawal of appeal against one — Effect of.

Search — No search warrant — Raid on premises "on the instruction of the O.C.P.D." — Resistance to arrest by show of force — Penal Code, ss.352 and 353.

In this case the respondent was charged on two counts: (1) gaming, punishable under section 6(1) of the Common Gaming Houses Ordinance, 1953 and (2) using criminal force on two police officers, punishable under section 353 of the Penal Code. The charges were separately tried and in both cases the respondent was acquitted without being called on to enter his defence. The prosecution appealed against the acquittal in both cases, but withdrew the appeal on the first charge.